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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 274

MARTIN L. WAXMAN, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

LEONA CORBELL, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

ANGELO GIORDANO, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

JOSEPHINE SPENCE, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

JURISDICTIONAL STATEMENT

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IN THE

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No.

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ANGELO GIORDANO, *Appellant*,

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JOSEPHINE SPENCE, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgments of the Supreme Court of Appeals of Virginia, dated January 15, 1962, petitions for rehearing thereof having

been thereafter denied on March 5, 1962, which judgments affirmed the Order of Conviction of the Circuit Court of the City of Radford, Virginia, entered on December 29, 1960, upon a trial *de novo*, following earlier judgments of conviction entered in the Municipal Court of the City of Radford, Virginia, on June 27, 1960, for violation of the third paragraph of Section 40-64, Code of Virginia.

Opinions Below

The opinion of the Supreme Court of Appeals of Virginia is reported at 203 Va. 257, 123 S. E. 2d 381 (R. 48-49; *infra*, pp. App. 9-10). No opinions were written by the Circuit Court or by the Municipal Court.

Jurisdiction

Appellants were charged with and convicted of violating the third paragraph of Section 40-64, Code of Virginia, in that, not being employees of the picketed company, they nevertheless participated in picketing activity (R. 5-20). The judgments of conviction were entered in the Municipal Court on June 27, 1960 (R. 5-6, 9-10, 13-14, 17-18). Upon a trial *de novo* in the Circuit Court in which the case was submitted on the transcript of record in the Municipal Court (R. 38, 42, 44), an order of conviction was entered in the Circuit Court on December 29, 1960 (R. 42-45). After writs of error and supersedeas were issued by the Supreme Court of Appeals of Virginia on June 13, 1961 (R. 1-4), it entered final judgments affirming the convictions dated January 15, 1962 (R. 50, 52, 54, 56). Petitions for rehearing were denied by that

court on March 5, 1962 (R. 51, 53, 55, 57). Notices of appeal to the United States Supreme Court were filed on May 31, 1962 in the Circuit Court of the City of Radford, Virginia (R. 58-75). The jurisdiction of this Court to review by appeal the final judgments of the Supreme Court of Appeals of Virginia is conferred by 28 U.S.C. 1257 (2).

Statutes Involved

Section 40-64 of the Code of Virginia (Michie 1953 Repl. Vol.), including the third paragraph under which appellants were convicted, reads as follows:

> "No person shall singly or in concert with others interfere or attempt to interfere with another in the exercise of his right to work or to enter upon the performance of any lawful vocation by the use of force, threats of violence or intimidation, or by the use of insulting or threatening language directed toward such person, to induce or attempt to induce him to quit his employment or refrain from seeking employment.
>
> "No person shall engage in picketing by force or violence, or picket alone or in concert with others in such manner as to obstruct or interfere with free ingress or egress to and from any premises, or obstruct or interfere with free use of public streets, sidewalks or other public ways.
>
> "When a strike or lockout is in progress, no person who is not, or immediately prior to the time of the commencement of any strike or lockout was not, a bona fide employee of the business or industry being picketed shall participate in any picketing or any picketing activity with respect to such strike or lockout.

"Any person violating any of the provisions of this section shall be guilty of a misdemeanor and punished accordingly.

"Notwithstanding the punishments herein provided any court of general equity jurisdiction may enjoin picketing prohibited by this section, and in addition thereto, may enjoin any picketing or interference with lawful picketing when necessary to prevent disorder; restrain coercion, protect life or property, or promote the general welfare."

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. §151, *et seq.*) provide as follows:

"Sec. 2. When used in this Act—

* * * *

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * *

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *

* * * *

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Questions Presented

The following questions are presented by this appeal:

1. Upon the expiration of a collective agreement between a labor organization and an employer engaged in activities affecting interstate commerce within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. Section 151, *et seq.*, the labor organization, which was the lawful exclusive bargaining agent of the employees, called and conducted a lawful strike against the employer to secure and safeguard wages, hours and working conditions of said employees. During said strike, representatives of the labor organization, who were non-employees of the struck employer, took part in peaceful picketing and peaceful picketing activity. They were arrested and convicted under a state statute prohibiting picketing and picketing activity by non-employees during any strike. The first question presented is whether such picketing and picketing activity are exclusively regulated and protected by the National Labor Relations Act, so that the state statute prohibiting the same is unconstitutional under the "Supremacy Clause", Article VI, Clause 2, of the Constitution of the United States.

2. Whether, in the circumstances above set forth, the state statute is unconstitutional on the further

ground that it violates the guarantees of freedom of speech and freedom of assembly contained in the Fourteenth Amendment to the Constitution of the United States.

3. Whether, in the circumstances above set forth, the convictions of the appellants under said state statute were unlawful and improper.

Statement

I. When and How the Federal Questions Were Raised

The federal questions presented by this appeal were first raised by the appellants in the Municipal Court of the City of Radford, Virginia, by written motions to dismiss (R. 21-22), and were pressed throughout the trial in that court (R. 23, 28-29, 34-35, 37). Exceptions were taken in that court to its overruling of the motions (R. 28, 35, 37). The federal questions were thereafter urged at each succeeding stage throughout the proceedings in the Virginia courts: by renewal of the motions to dismiss in the Circuit Court (R. 38-39, 43), and by exception to that court's overruling of such motions (R. 39, 43); by a notice of appeal and assignments of error filed in the Circuit Court on February 6, 1961 (R. 45-46); by the brief filed on behalf of appellants in the Supreme Court of Appeals of Virginia; and by the petitions for rehearing filed in that court.

II. The Facts

The facts are simple and undisputed:

Kenrose Manufacturing Company, Inc., is a manufacturer of ladies' garments with plants in several Virginia cities (R. 21, 24). It both ships and receives products worth more than $1,000,000 per year across state lines, and is admittedly engaged in activities affecting interstate commerce within the meaning of the National Labor Relations Act, as amended (R. 21, 24).

For 15 years Kenrose has had a collective agreement with the International Ladies' Garment Workers' Union, which is the designated bargaining representative of the Kenrose employees (R. 21, 24). Upon the expiration of the last collective agreement, the Union called and conducted a strike and carried on picketing; it is stipulated that "the objective of the strike, picketing and other concerted activities is the securing and safeguarding of wages, hours and working conditions of the employees of Kenrose" (R. 26, 37).

Appellant Waxman is the Education Director and the other three appellants are international representatives of the Union's Upper South Department (R. 21, 25, 26-27). None of these four Union staff members is an employee of Kenrose (R. 25, 27-28, 37). They were in Virginia during the strike to help the Kenrose employees achieve the lawful objective abovementioned (R. 27, 37).

As part of their duties, the appellants walked in the picket line. They were completely peaceful at all

times. As the Chief of Police testified, appellants Spence, Correll and Giordano simply "marched in the picket line", were "peaceful", "cooperated with the police", and "there were no threats or violence" (R. 33-34).

Appellant Waxman, walking the picket line, would step back as cars approached the plant and, waving his hand, would urge them to "Go home, go home" (R. 30). As the Chief of Police testified, Waxman was "peaceful", "free from any violence", and "free from any threats", and had an understanding with the Chief of Police "not to interfere with traffic, threats of violence and things of that nature", and was "very cooperative with the police * * * and he did everything to carry out peace and order at this picket line" (R. 31-32).

Despite this wholly unexceptional conduct, the four union representatives were arrested and charged with violation of the third paragraph of Section 40-64 of the Code of Virginia which forbids non-employees to participate in picketing or picketing activity (R. 5, 7, 9, 11). After trial, the Municipal Court found them guilty and sentenced them to fines of $25 each and, in the case of the two men, suspended jail terms (R. 5-6, 9-10, 13-14, 17-18). Upon a trial *de novo* in the Circuit Court, they were again found guilty and all four were sentenced to fines of $50 each and jail terms of 60 days, the latter suspended for a period of one year conditioned on good behavior (R. 44). These convictions were sustained by the Supreme Court of Appeals (R. 50, 52, 54, 56; *infra*, pp. App. 1-10) and rehearing was thereafter denied (R. 51, 53, 55, 57).

III. The Disposition Below of the Federal Questions

In overruling the federal constitutional contentions raised by the appellants, the Municipal Court simply cited the decision handed down in 1957 by the Supreme Court of Appeals of Virginia in *Dougherty v. Commonwealth of Virginia*, 199 Va. 515, 100 S.E. 2d 754 (R. 28). The Circuit Court relied on the same case in overruling the constitutional motions made by appellants in that court (R. 39, 40).

The Supreme Court of Appeals in the instant case, in rejecting the appellants' constitutional claims, merely reaffirmed the correctness of its earlier *Dougherty* case and did not seek to canvass the problem anew (R. 48-49).

Since the *Dougherty* case is thus the foundation stone on which rests the instant one, we are printing that opinion in the Appendix for the convenience of the Court (*infra*, pp. App. 11-22).

The Questions Are Substantial

1. The court below, standing on its 1957 *Dougherty* decision, made no reference whatever to the supervening 1959 decision of this Court in *Garmon v. San Diego Building Trades Council*, 359 U.S. 236. It thus ignored the controlling decision which stands as "a landmark in * * * 'preemption' cases in the labor field" (concurring opinion, 359 U.S., at 250). After *Garmon*, it can no longer be doubted that when an "activity is arguably within the compass of §7 or §8 of the Act, the State's jurisdiction is displaced" (359 U.S., at 246).

In the instant case it is, at a minimum, "arguable" that the appellants' peaceful picketing is protected by Section 7 of the Act, so that the state is without power to regulate or forbid it. Indeed, it is more than merely arguable. For the protected nature of the picketing can hardly be doubted under the established decisions of this Court.

Here, upon the expiration of a collective agreement with a company admittedly subject to the Act, the long-time bargaining representative called a strike and carried on peaceful picketing (*supra*, p. 7). As was stipulated, "the objective of the strike, picketing and other concerted activities [was] the securing and safeguarding of wages, hours and working conditions of the employees" (*supra*, p. 7). Because they participated in the peaceful picketing, the union representatives were branded as criminals under state law and sentenced to fines and suspended jail terms.

This Court spoke directly to the point in *UAW v. O'Brien*, 339 U.S. 454; and *Amalgamated Ass'n v. WERB*, 340 U.S. 383. In both cases it held (339 U.S., at 457; 340 U.S., at 390):

> "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."

The court below, in the *Dougherty* case, conceded that the "employees of the establishments" had protected rights to strike and picket under Sections 7 and 13 of the Act; however, it declared that these provisions of the Act did "not extend to" their union representatives (*infra*, p. App. 21). This attempted bifurcation is plainly specious.

In the first place the union, as such, was itself engaged in a "labor dispute" with Kenrose. Section 2(9) of the Act defines a labor dispute as including a controversy concerning terms and conditions of employment "regardless of whether the disputants stand in the proximate relation of employer and employee". Since the union was itself a party to the labor dispute, it had an undoubted right under Section 13 to strike and picket, quite apart from the employees.

Secondly, even were we to look at the matter from the standpoint of the employees, it is well established, under the Act, that employees are entitled to have the aid and protection of an outside labor organization in carrying on their concerted activities. Indeed, without the support and guidance of such a union, employees are often helpless in seeking to implement their rights. See, for example, *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113; *NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226; *Thomas* v. *Collins*, 323 U.S. 516, 533-534; *NLRB* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147 (C. A. 6); *NLRB* v. *Cities Service Oil Co.*, 122 F. 2d 149 (C. A. 2); *Hoolon Fuel Co.*, 8 NLRB 25, 32; *cf. NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 248, 251 (unfair labor practice for an employer to refuse to meet with an employee committee because it was accompanied by an outside organizer); *Note*, 65 Yale L.J. 423, 426-427.

Since the federal Act permits employees to carry on their protected concerted activities through outside representatives, Virginia's contrary view cannot stand. Its "policy" that "the employer and the employees should be left free to resolve their differences without pressure from outside influences" (*infra*,

p. App. 20) conflicts with national labor policy and must defer to it.

This Court has previously struck down state efforts to forbid picketing by union representatives. In *UMW* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, overturning the state court injunction, the Court held that Sections 7 and 13 protect the right to strike and picket by the employees "and their union" (at 63, 75). And in *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, it set aside the state ban on peaceful picketing by "strikers and union representatives" (at 132, 139-140). See, also, *Hotel Employees Union* v. *Sax Enterprises*, 358 U.S. 270 (Florida injunction against stranger organizational picketing reversed); *McMahon* v. *Milam Mfg. Co.*, 368 U.S. 7 (Mississippi injunction against picketing carried on by non-employees of the plant reversed); *cf. NLRB* v. *Drivers Local Union*, 362 U.S. 274; *NLRB* v. *Rice Milling Co.*, 341 U.S. 665, 673, fn. 8.

Nor can the Virginia statute limiting picketing to employees be sustained, as the court below sought to do, "as a measure to prevent violence" (*infra*, pp. App. 22, 19-20). There simply is no rational basis for the court's assumption (*id.*), plucked out of thin air, that to permit union representatives to picket would bring about massed picket lines, force and violence.* Virginia no doubt can lawfully prohibit, punish and enjoin picketing by force or violence or that which blocks ingress or egress (*UAW* v. *WERB*, 351 U.S. 266; *Youngdahl* v. *Rainfair, Inc.*, 355 U.S.

* The court said that if outsiders could picket, "numbers could thus be added with sufficient strength to turn peaceful picketing into picketing by force with its accompanying coercion and power" (*infra*, p. App. 19).

131; *cf. Allen-Bradley Local* v. *WERB*, 315 U.S. 740). Indeed, it has done just that in the paragraphs of Section 40-64 *other* than the third paragraph involved in this case (*supra*, pp. 3-4). But because Virginia in these other paragraphs has properly outlawed violent picketing gives it no warrant to ban peaceful picketing, even when carried on by a single non-employee, on the fanciful supposition that this ban too "has a direct relation to the prevention of disorder and coercion" (*infra*, p. App. 20). The unreality of the court's supposition is spotlighted by the Police Chief's testimony that the appellants were "peaceful" and, far from bringing about violence, "cooperated with the police" and "did everything to carry out peace and order at this picket line" (*supra*, p. 8).

The sum of the matter is that the convictions of the appellants for peacefully picketing cannot stand consistently with the doctrine of preemption. The decision below flies directly in the face of the entire group of preemption decisions of this Court from *Garner* v. *Teamsters Union*, 346 U.S. 485 (especially at 499-500), through and beyond the *Garmon* case, *supra*. *Cf. DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Superior Court* v. *Washington ex rel. Yellow Cab Service, Inc.*, 361 U.S. 373; *McMahon* v. *Milam Mfg. Co.*, 368 U.S. 7; *Engineers Ass'n* v. *Interlake Steamship Co.*, decided June 11, 1962, No. 166, this Term. Just as an employer is not permitted to use the weapon of discharge to interfere with Congressionally protected concerted activities (*NLRB* v. *Washington Aluminum Co.*, decided May 28, 1962, No. 464, this Term), so is a state not allowed to use the sanction of fine and imprisonment. In both instances they must defer to the will of Congress.

The issues involved in this case are of public importance to the country at large and of course to the labor movement in Virginia. In that Commonwealth, the third paragraph of Section 40-64 has time and again been applied *in terrorem* against strikes and picketing carried on lawfully under the national Act. This Court should review the issues presented by the Virginia statute and make clear that the statute cannot stand consistently with the national labor policy.

2. Even if interstate activities were not involved, a blanket ban on picketing by non-employees cannot be reconciled with the guarantees of freedom of speech and freedom of assembly contained in the Fourteenth Amendment. The third paragraph of Section 40-64 and the convictions thereunder must fall for this reason too.

We recognize that the sweeping pronouncements of *Thornhill* v. *Alabama*, 310 U.S. 88, and *AFL* v. *Swing*, 312 U.S. 321, have been limited by later decisions. Because picketing involves non-speech as well as speech elements, the Court has upheld the right of a state to prohibit picketing which is carried on for an objective forbidden by the state's law or contrary to its public policy. E.g., *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490; *Hughes* v. *Superior Court*, 339 U.S. 460; *Teamsters Union* v. *Hanke*, 339 U.S. 470; *Building Service Employees* v. *Gazzam*, 339 U.S. 532; *Plumber's Union* v. *Graham*, 345 U.S. 192; *Pappas* v. *Stacey*, 350 U.S. 870; *Teamsters Union* v. *Vogt*, 354 U.S. 284.

All these cases have rested on the improper objective sought to be achieved by the picketing. But in the instant case the objective of the picketing—the "secur-

ing and safeguarding of wages, hours and working conditions of the employees" (*supra*, p. 7)—is not contrary to any policy of the Commonwealth of Virginia. Nor, as already pointed out, was the manner of picketing in the slightest degree censurable (*supra*, pp. 12-13).

We know of no instance where this Court has sustained as constitutional a ban on picketing where the objective is proper and the conduct entirely peaceful. We think that, in such a situation, *Thornhill* still rules. Since picketing is at least in part a form of communication, and since the objective sought to be achieved is in accord with the state's policy, the communication cannot be prohibited merely because the men carrying the picket signs are not employees any more than it could be banned because there was no "labor dispute" as defined by state law. *AFL* v. *Swing*, 312 U.S. 321; *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769; *Cafeteria Union* v. *Angelos*, 320 U.S. 293.

There are some who believe that *Thornhill* has been laid to rest and that the Fourteenth Amendment no longer stands as a bar to any proscription of picketing. But this Court's *per curiam* reversal of the state court in *Teamsters' Union* v. *Newell*, 356 U.S. 341, expressly resting the decision on "*Thornhill* v. *Alabama*, 310 U.S. 88, 98, Third", would indicate that *Thornhill* is far from dead. And in *Teamsters Union* v. *Vogt*, 354 U.S. 284, 294-295, this Court reiterated the view that "State courts, no more than state legislatures, can enact blanket prohibitions against picketing".

A number of state courts, unlike the court below, have taken the cases limiting *Thornhill* to mean no more

than what they say and have held unconstitutional restrictions on non-employee picketing or requirements that a union must show a majority before using the picket line. E.g., *Baldwin* v. *Arizona Flame Restaurant*, 82 Ariz. 385, 313 P. 2d 759; *Gilbertson* v. *Culinary Alliance*, 204 Ore. 326, 282 P. 2d 632. We think these cases are right and that Virginia's blanket ban on non-employee peaceful picketing must fall. It is appropriate for this Court to settle this critical constitutional problem.

CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.

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July 1962

APPENDIX

I

[Judgments of the Supreme Court of Appeals of Virginia]

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 15th day of January, 1962.

MARTIN L. WAXMAN,

Plaintiff in error,

against Record No. 5372

COMMONWEALTH OF VIRGINIA,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Radford on the 29th day of December, 1959.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said circuit court.

A Copy,

Teste:

H. G. Turner
Clerk

Defendant in error's costs:

Attorney's fee	$50.00
Printing brief	40.00
Total	$90.00

Teste:

H. G. Turner
Clerk

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 15th day of January, 1962.

LEONA CORRELL,

Plaintiff in error,

against Record No. 5373

COMMONWEALTH OF VIRGINIA,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Radford on the 29th day of December, 1960.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said circuit court.

A Copy.

Teste:

H. G. Turner
Clerk

Defendant in error's costs:

Attorney's fee	$50.00
Printing brief	40.00
Total	$90.00

Teste:

H. G. Turner
Clerk

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 15th day of January, 1962.

ANGELO GIORDANO,

Plaintiff in error,

against Record No. 5374

COMMONWEALTH OF VIRGINIA,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Radford on the 29th day of December, 1960.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said circuit court.

A Copy.

Teste:

H. G. Turner
Clerk

Defendant in error's costs:

Attorney's fee	$50.00
Printing brief	40.00
Total	$90.00

Teste:

H. G. Turner
Clerk.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 15th day of January, 1962.

JOSEPHINE SPENCE,
Plaintiff in error,

against Record No. 5375

COMMONWEALTH OF VIRGINIA,
Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Radford on the 29th day of December, 1960.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said circuit court.

A Copy.

Teste:

H. G. Turner
Clerk

Defendant in error's costs:

Attorney's fee	$50.00
Printing brief	40.00
Total	$90.00

Teste:

H. G. Turner
Clerk

II

[Opinion of the Supreme Court of Appeals of Virginia]

Present: All the Justices

MARTIN L. WAXMAN

-v- Record No. 5372

COMMONWEALTH OF VIRGINIA

LEONA CORBELL

-v- Record No. 5373

COMMONWEALTH OF VIRGINIA

ANGELO GIORDANO

-v- Record No. 5374

COMMONWEALTH OF VIRGINIA

JOSEPHINE SPENCE

-v- Record No. 5375

COMMONWEALTH OF VIRGINIA

PER CURIAM

Richmond, Virginia, January 15, 1962

FROM THE CIRCUIT COURT OF THE CITY OF RADFORD
W. S. JORDAN, *Judge*

The appellants were convicted and fined $50 each for violating the third paragraph of Section 40-64 of the 1950 Code of Virginia, which is in the following words:

"When a strike or lockout is in progress, no person

who is not, or immediately prior to the time of the commencement of any strike or lockout was not, a bona fide employee of the business or industry being picketed shall participate in any picketing or any picketing activity with respect to such strike or lockout."

The employees of Kenrose Manufacturing Company were on strike and were picketing the company's plant. The appellants were not employees of the company but they participated in the picketing. They contend that paragraph three of Section 40-64 is unconstitutional. They concede that its constitutionality was expressly sustained in *Dougherty* v. *Commonwealth*, 199 Va. 515, 100 S. E. 2d 754 (1957). They say in their brief: "The facts in the *Dougherty* case are incapable of valid distinction from the cases of Waxman, Giordano, Correll and Spence," the cases now before the court; and "If this court shall find in their favor, it must overrule its prior decision in *Dougherty* v. *Commonwealth*. There is no escape from this conclusion."

The *Dougherty* case was carefully considered and the conclusion reached was in our opinion correct. For the reasons therein stated we again hold that paragraph three of Section 40-64 is constitutional and the judgments of conviction appealed from are accordingly.

Affirmed.

III

[Opinion of the Supreme Court of Appeals of Virginia in earlier case]

E. R. Dougherty, et al. v. Commonwealth of Virginia
199 Va. 515, 100 S. E. 2d 754 (1957)

WHITTLE, *J.*: Dougherty and Childs, hereinafter called defendants, were arrested in Brunswick County on warrants charging them with unlawful picketing in violation of Section 40-64, paragraph 3, Code of Virginia, 1950, as amended by Acts of Assembly 1952, chapter 674, pages 1123, 1124. Upon conviction in the Trial Justice Court the defendants appealed to the Circuit Court where the cases were submitted to the court upon an agreed stipulation of facts. Dougherty was adjudged guilty of one offense and fined $25; Childs was adjudged guilty of two separate offenses and fined $25 for each offense. To review these judgments we granted defendants writs of error.

Defendants state the issues involved as follows:

"1. Does the third paragraph of Section 40-64 of the Code of Virginia, 1950, as amended,[1] violate the

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[1] "§ 40-64. PREVENTING PERSONS FROM PURSUING LAWFUL VOCATIONS, ETC.; ILLEGAL PICKETING; INJUNCTION.

[1] "No person shall singly or in concert with others interfere or attempt to interfere with another in the exercise of his right to work or to enter upon the performance of any lawful vocation by the use of force, threats of violence or intimidation, or by the use of insulting or threatening language directed toward such person, to induce or attempt to induce him to quit his employment or refrain from seeking employment.

[2] "No person shall engage in picketing by force or violence, or picket alone or in concert with others in such manner as to obstruct or interfere with free ingress or egress to and from any premises, or obstruct or interfere with free use of public streets, sidewalks or other public ways.

[3] "When a strike or lockout is in progress, no person who is

right of freedom of speech, assemblage and the right to picket, peacefully, as guaranteed under the First Amendment to the Constitution of the United States, and Section 12, Article I of the Constitution of Virginia, protected against infringement by a state by the 14th Amendment to the Constitution of the United States?

"2. Are the rights of the defendant to participate in picketing or picketing activities protected under the National Labor Relations Act, as amended by Labor Management Relations (Taft-Hartley) Act 1947?"

The stipulated facts are generally as follows: Brunswick Box Company, Inc. and E. E. Van Volkenburg and Company, a partnership, are concerns engaged in separate operations but both establishments are located on the same premises near the town of Lawrenceville. At the time under consideration the employees of each establishment were organized and belonged to a labor union known as Local 2518 which was the collective barganing agent for the employees. Local 2518 was affiliated with the Eastern District Council of Carpenters of Virginia, chartered by the United Brotherhood of Carpenters and Joiners of America, International, A. F. of L.

The Local was on strike for a lawful purpose and was

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not, or immediately prior to the time of the commencement of any strike or lockout was not, a bona fide employee of the business or industry being picketed shall participate in any picketing or any picketing activity with respect to such strike or lockout.

[4] "Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and punished accordingly."

[5] "Notwithstanding the punishments herein provided any court of general equity jurisdiction may enjoin picketing prohibited by this section, and in addition thereto, may enjoin any picketing or interference with lawful picketing when necessary to prevent disorder, restrain coercion, protect life or property, or promote the general welfare."

engaged in picketing the above establishments which were being operated at the time with non-striking employees. The picketing was peaceful, free from violence, threats or other lawlessness.

Neither of the defendants was at the time nor immediately prior to the commencement of the strike a *bona fide* employee of either establishment and neither had ever been so employed. They were employees of the Eastern District Council of Carpenters of Virginia.

Both defendants had been in Brunswick County from time to time for several months prior to the incidents involved for the purpose of assisting in the organization of the labor union, which was of recent origin and engaged in its first strike.

While the strike was in progress it was the practice of the defendants to participate daily in the picketing activities. Dougherty was charged with one offense and Childs was charged with two; Childs carried a sign in the picket line on one occasion; on the other occasions the defendants marched in the picket line but did not carry signs.

The basic issue presented in the first question posed by defendants is whether or not the First Amendment to the Constitution of the United States and Section 12, Article I of the Constitution of Virginia bars the Commonwealth from prohibiting anyone who is not, or was not immediately prior to the strike or lockout an employee of a business concern, from picketing said business while there is a strike or lockout.

The defendants contend that they have a right to picket under the right of freedom of speech and assemblage guaranteed by the First Amendment to the Constitution of the United States and Section 12, Article I, of the Constitution of Virginia, the same being protected against infringement by the Fourteenth Amendment to the Constitu-

tion of the United States, and that paragraph 3 of Section 40-64 contravenes this right.

The Commonwealth on the other hand contends that paragraph 3 of Section 40-64 is a valid exercise of the police power of the State.

In 1950 we had under consideration in *Edwards* v. *Commonwealth*, 191 Va. 272, 60 S. E. 2d 916, the third paragraph of Section 40-64 as originally enacted, and declared the same to be unconstitutional as applied to picketing where no strike was in progress because, as written, it was too broad in its possible applications. At that time this paragraph read:

> "It shall be unlawful for any person who is not, or immediately prior to the commencement of any strike was not a bona fide employee of the business or industry being picketed, to participate in any picketing or any picketing activity with respect to such strike or such business or industry."

The defendants in the *Edwards* case were arrested for picketing a colored theatre while no strike was in progress. There they were seeking to compel the theatre to employ a Negro manager. The defendants were not employees of the theatre nor were they employed in the moving picture industry. There we held the statute as drawn to be too broad. The opinion in that case stated: (191 Va., at p. 276)

> "We could, of course, add to or rearrange the words of the statute and make its third section apply only when there is a strike; but our function is to interpret the Act as written, not to rewrite it. *Va. Ass'n of Ins. Agents* v. *Commonwealth*, 187 Va. 574, 578, 47 S. E. 2d 401, 404; *Lewis* v. *Commonwealth*, 184 Va. 69, 73, 34 S. E. 2d 389, 390."

Following the decision in the *Edwards* case, the next regular session of the General Assembly amended the statute to make it applicable only when a strike or lockout is in progress. The General Assembly evidently interpreted the language quoted above as implying that if the third paragraph of Section 40-64 applied only while a strike was in progress then it would be a constitutional exercise of the police power of the State. The language, in fact, related to the meaning rather than to the constitutionality of the section.

Defendants in their brief and in argument before us cite and rely upon the long series of cases in which the Supreme Court has been called upon to consider the limits imposed by the Fourteenth Amendment on the power of States to enjoin picketing. The cases decided by the Supreme Court prior to September, 1950, beginning with *Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940), were thoroughly analyzed by our Court in the *Edwards* case and need not be restated here. These cases and others decided since September, 1950, have been painstakingly analyzed by Mr. Justice Frankfurter in the recent case (October Term, 1956) of *International Brotherhood of Teamsters, Local 695, A. F. L., et al.* v. *Vogt, Inc.*, 354 U. S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347.

The facts in the *Vogt* case were as follows: Vogt, Inc. owned and operated a gravel pit in Wisconsin where it employed fifteen or twenty men. The union sought unsuccessfully to induce some of the employees to join the union and commenced picketing the entrance to the business with signs reading "The men on this job are not 100% affiliated with the A. F. L.". In consequence, drivers of several trucking companies refused to haul material to and from the plant, causing damage to the respondent (Vogt, Inc.). Respondent sought an injunction to restrain the picketing.

While the trial court did not make the finding requested by respondent that the picketing was engaged in for the purpose of "coercing, intimidating and inducing the employer to force, compel or induce" its employees to join the union, the court nevertheless held that by virtue of a Wisconsin statute (§ 103.535) prohibiting picketing in the absence of a "labor dispute", the petitioners must be enjoined from maintaining any pickets near respondent's establishment, from displaying near the premises signs indicating that there was a labor dispute between management and its employees or between respondent and any of the petitioners, and from inducing others to decline to transport goods to and from respondent's place of business.

On appeal the Wisconsin Supreme Court at first reversed, relying on *AFL v. Swing*, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855, to hold Section 103.535 unconstitutional, on the ground that picketing could not constitutionally be enjoined mainly because of the absence of a "labor dispute." (270 Wis. 315, 71 N. W. 2d 359)

Upon reargument, the court withdrew its original opinion and made the requested finding referred to above. The court canvassed the facts surrounding the picketing and observed that "One would be credulous, indeed, to believe under the circumstances that the union had no thought of coercing the employer to interfere with its employees in their right to join or refuse to join the defendant union." Therefore the court held the picketing was for "an unlawful purpose," since a Wisconsin statute (§ 111.06(2)(b)) made it an unfair labor practice for an employee individually or in concert with others to "coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights * * * or to engage in any practice with regard to his employees which would constitute an unfair labor practice if

undertaken by him on his own initiative." Here the court relied on *Building Service Employees* v. *Gazzam*, 339 U. S. 532, 70 S. Ct. 784, 94 L. Ed. 1045, and *Pappas* v. *Stacey*, 151 Me. 36, 116 A. 2d 497, and affirmed the granting of the injunction on this ground. 270 Wis. 321a, 74 N. W. 2d 749. Upon appeal, the Supreme Court, in a five-to-three decision, affirmed. 354 U. S. 284, *supra*.

In discussing the case of *Thornhill* v. *Alabama*, *supra*, the majority opinion in the *Vogt* case says:

> "As the statute dealt at large with all picketing, so the court broadly assimilated peaceful picketing in general to freedom of speech, and as such protected against abridgement by the Fourteenth Amendment."

The holdings in the *Thornhill* case were applied by the Supreme Court in the case of *AFL* v. *Swing*, *supra*, to hold unconstitutional an injunction against peaceful picketing based on a state's common law policy against picketing when there was no immediate dispute between employer and employee.

The opinion of the Supreme Court in the *Vogt* case continues:

> "Soon, however, the court came to realize that the broad pronouncements, but not the specific holding, of *Thornhill* had to yield 'to the impact of facts unforeseen,' or at least not sufficiently appreciated. *Cf. People* v. *Schweinler Press*, 214 N. Y. 395, 108 N. E. 639, 28 Harv. L. Rev. 790. Cases reached the court in which a state had designed a remedy to meet a specific situation or to accomplish a particular social policy. These cases made manifest that picketing, even though 'peaceful' involved more than just communication of ideas and could not be immune from all state regulation. 'Picketing by an organized group is more than

free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.' *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, 776 (concurring opinion); *see Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722, 725-728.

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"The implied reassessments of the broad language of the *Thornhill* case were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation. The decisive reconsideration came in *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490. A union seeking to organize peddlers, picketed a wholesale dealer to induce it to refrain from selling to non-union peddlers. The state courts, finding that such an agreement would constitute a conspiracy in restraint of trade in violation of the state antitrust laws, enjoined the picketing. This Court affirmed unanimously.

"'It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgement of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute • • •. But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to non-

union peddlers. Thus all of appellants' activities * * * constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did not more than enjoin an offense against Missouri law, a felony.' *Id.*, at 497-498.

"The court therefore concluded that it was 'clear that appellants were doing more than exercising a right of free speech or press * * *. They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade.' *Id.*, at 503.

* * *

"This series of cases, then, established a broad field in which a state, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."

Applying the clear ruling in the *Vogt* case to the cases before us, we find no constitutional inhibition to a state enacting a law prohibiting strangers from entering the picket line when a strike or lockout is in progress. When we consider paragraph 3, here involved, in context with the other provisions of Section 40-64, the prohibition contained therein has a tendency to place a reasonable limitation on the number of persons engaged in picketing and is thus a peace and order measure. If the defendants in the instant cases be allowed to freely join the picket line then other strangers to the controversy would have the same right and numbers could thus be added with sufficient strength to turn peaceful picketing into picketing by force with its accompanying coercion and power. The limitation placed upon picketing to those directly involved in the

issue, causing it, has a direct relation to the prevention of disorder and coercion.

As we said in the *Edwards* case, *supra* (191 Va., at p. 285), the State may regulate picketing if such regulation has "a reasonable basis in prevention of disorder, restraint of coercion, protection of life or property, or promotion of the general welfare."

Another plausible purpose of the act, beyond the preservation of peace and order, is to express a policy of the State that when a situation gets to the point of a strike or lockout, both the employer and the employees should be left free to resolve their differences without pressure from outside influences.

It cannot be doubted that paragraph 3 of Section 40-64, as amended, embraces an avowed public policy of the State. The General Assembly was unwilling to abandon such policy after our decision in the *Edwards* case and immediately reenacted the statute in an attempt to correct its defects. Here the State, through its legislature, clearly "designed a remedy to meet a specific situation or to accomplish a particular social policy," and, as stated in the majority opinion in the *Vogt* case, "These cases [those decided by the Supreme Court] made manifest that picketing, even though 'peaceful,' involved more than just communication of ideas and could not be immune from all State regulation. 'Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'"

We are therefore of the opinion that the paragraph in question (par. 3, Section 40-64) is not violative of either the State or Federal Constitution.

The remaining question posed by defendants is "Are the rights of the defendant to participate in picketing or picketing activities protected under the National Labor Relations Act, as amended by Labor Management Relations (Taft-Hartley) Act, 1947?"

A reading of the pertinent provisions of the Taft-Hartley Act, as amended (29 U. S. C. A., §§ 152, 157, 163)[2] discloses that it is concerned with and limited to the relations between employers and employees. The defendants in the instant cases were not and never had been employees of the establishments here involved. Therefore the provisions of the Act giving and protecting the rights of employees to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," among which are striking and picketing, does not extend to the defendants.

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[2] "(3). The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *." (29 U. S. C. A. § 152(3).

"Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3:47 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 130." (29 U. S. C. A. § 157)

"Right to strike preserved.

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right. July 5, 1935, c. 372, § 13, 49 Stat. 457; June 23, 1947, 3:17 p.m. E.D.T., c. 120, Title I, § 101, 61 Stat. 151." (29 U. S. C. A., § 163)

There is no provision in the National Labor Relations Act which attempts to include within the jurisdiction of the National Labor Relations Board the policing of picketing so as to maintain peace and order and prevent violence. This is a matter within the jurisdiction of State and local authorities.

The statute in question was enacted as a measure to prevent violence while a strike or lockout is in progress. It in no way interferes with the peaceful picketing of the employees concerned in the strike. See *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154, and cases therein cited.

For the reasons stated the judgment of the trial court is affirmed.

Affirmed.